

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMY MISCHLER
1120 Palm Court
Okeechobee, Florida 34974

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
200 Independence Avenue SW
Washington, DC 20201

SECRETARY ALEX AZAR,
U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Official Capacity
200 Independence Avenue SW
Washington, DC 20201

Defendants.

Case: 1:19-cv-02493
Assigned To : Chutkan, Tanya S.
Assign. Date : 8/12/2019
Description: FOIA/Privacy Act (I-DECK)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Amy Mischler brings this action against the U.S. Department of Health and Human Services and Secretary Alex Azar under the Freedom of Information Act, 5 U.S.C. § 522 (FOIA), and the Declaratory Judgment Act, 28 USC, §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA, 42 U.S.C. §5108, and 42 U.S.C. §5106a(b)(1)(A).

2. Further, Plaintiff Amy Mischler seeks declaratory relief that the U.S. Department of Health and Human Services falsified and fabricated the truth to Congressional House of Representative member W. Gregory Steube concerning the "guidelines" of FOIA appeal.



JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendant HHS has failed to comply with the applicable time-limit provisions of the FOIA, Ms. Mischler is deemed to have exhausted her administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

5. Because Defendant Azar has failed to provide mandatory oversight required by 42 U.S.C. §5108 to the administration of funding to the Commonwealth of Kentucky through 42 U.S.C. §5106a (CAPTA); failing to enforce the required provision of mandating Kentucky Governors to certify they won't violate statutory laws in return for CAPTA funding. Ms. Mischler is entitled to judicial action against Secretary Azar to enforce the statutory provisions of 42 U.S.C. §5106a and 42 U.S.C. §5108.

6. Further, Venue and Jurisdiction is proper because this is the Judicial District where Defendant HHS intentionally misrepresented the truth to Congressman W. Gregory Steube who was contacted by Ms. Mischler as her representative to provide constituent services on this matter.

PARTIES

7. Plaintiff Amy Mischler is a citizen of the United States; domiciled in Florida. The Commonwealth of Kentucky has maintained defamatory and untrue child abuse records about Ms. Mischler. As late as 2016 Kentucky defrauded 42 U.S.C. §5106a federal funding from Defendant HHS claiming that "child abuse" services were provided to Ms. Mischler in Kentucky though she

has lived in Florida since 2010.¹ The Commonwealth of Kentucky later committed obstruction of justice by destroying these defamatory records on Ms. Mischler with Kentucky Governor Matt Bevin claiming to the Federal Sixth Circuit Court of Appeals that 1) Kentucky had no records, 2) that Kentucky had never placed Ms. Mischler on its child abuse registry as a child abuser, and 3) that Ms. Mischler is mentally ill.²

8. Defendant U.S. Department of Health and Human Services (HHS) is a department of the executive branch of the U.S. government headquartered in Washington, D.C., and an agency of the Federal government within the meaning of 5 U.S.C. § 552(f)(1). Defendant HHS has possession, custody, and control of the records that Ms. Mischler is seeking.

9. Defendant Secretary Alex Azar is the Secretary of the U.S. Department of Health and Human Services. Congress specifically obligated the Secretary of the U.S. Department of Health and Human Services in 42 U.S.C. § 5101 to “*ensure that such functions and activities are executed with the necessary expertise and in fully coordinated manner*” with federal grant money distributed in 42 U.S.C. § 5106a, including the requirement of Kentucky Governors to sign a state plan pursuant to 42 U.S.C. § 5106a(b)(1) and (2)(B); that Kentucky will promise to “enforce[] State law” regarding child abuse statutes in return for substantial federal funding. Further Congress also memorialized and obligated the Secretary of the U.S. Department of Health and Human Services to be responsible for the administration of 42 U.S.C. § 5106a in 42 U.S.C. § 5108.

10. Ms. Mischler requested a FOIA of the Commonwealth of Kentucky state plans required to exist under 42 U.S.C. § 5106a and 42 U.S.C. § 5108 and has been told by the Defendant HHS that they do not exist.

¹ Kentucky is required to give U.S. Constitutional due process notice of placement on its administrative child abuse registry through certified mail to the individual.

² Defendant HHS own Office of Civil Rights has records disputing the false statements by Kentucky Governor Matt Bevin to the Sixth Circuit Court of Appeals from 2007 over a decade before the 2018 false statements.

PROCEDURAL HISTORY OF FOIA 19-F-0091

11. Dec. 10, 2018: Ms. Mischler submitted a FOIA request online. The Case number 19-F-0091 was assigned by Defendant HHS from its ACF division.

12. April 29, 2019: Defendant HHS gave its final response and said the records did not exist.

13. May 29, 2019: Ms. Mischler emailed Defendant HHS and stated the records must exist according to statute 42 U.S.C. 5106a trying to avoid filing an administrative appeal per instructions given by Defendant HHS. She stated the specific statute and even gave a link to the statutory law to Defendant HHS to prove the records must exist.

14. *It became clear that Defendant HHS had no intention of resolving the matter and was attempting to run the 90 days to file an appeal from multiple emails back and forth.*³

15. June 10, 2019: Ms. Mischler filed an appeal of FOIA 19-F-0091. It was delivered by the United States Postal Service with signature confirmation and tracking. D. Franklin signed for it. See Attachment 1.

16. Ms. Mischler took pictures of the envelope to show she complied with instructions to notate that it was an FOIA Appeal. FOIA Appeal was clearly marked on both sides of the envelope.⁴

17. Defendant HHS refused to acknowledge receipt of the appeal despite emails being sent to multiple employees of Defendant HHS.⁵

³ ACF FOIA at one point told Plaintiff Mischler to ask Kentucky for the records and wrote that Plaintiff Mischler was asking the wrong federal agency for these records. She was directed to ask the Treasury for the CAPTA records.

⁴ Photos are available upon request.

⁵ During the course from February to July 2019, Ms. Mischler made dozens of phone calls and emails to the Defendants including to Secretary Alex Azar to enquire about the FOIA. She also contacted the White House and was ignored.

18. July 16, 2019: Ms. Mischler filed a request with her Congressman Representative W. Gregory Steube of the missing appeal as it was statutorily overdue.

19. July 18, 2019: Defendant HHS found the appeal but refused to acknowledge their mishandling and dated the appeal as received on July 18, 2019 though it was received on June 10, 2019. See Attachment 1 and 2. Appeal number 2019-00051-A-OS was assigned.

20. July 19, 2019; Defendant HHS stated that they corrected the mistake of date received, however continued to treat the appeal as if it was received July 18, 2019 instead of expediting the appeal as requested by Ms. Mischler because they let her appeal sit on a desk from June 10, 2019 until July 18, 2019 pretending they didn't receive it. See Attachment 3, 4 and 5.

21. July 29, 2019: Defendant HHS stated that the appeal received June 10, 2019 would be finalized August 31, 2019. This is 58 working days beyond actual receipt on June 10, 2019 and 31 working days counting July 18, 2019 as "received". See Attachment 5.

22. Defendant HHS continued to treat the Appeal as if it was received on July 18, 2019. See Attachment 5.

23. Defendant HHS did not give Ms. Mischler written notice of "*unusual circumstances*" for an additional ten day extension it gave itself required by §552(a)(6)(B)(i). See attachment 6.

24. [I]f the agency has not [timely issued its 'determine[.]' . . . the requester may bring suit directly in federal district court without exhausting administrative appeal remedies." Crew, 2013 WL 1296289, at *1 and 12-cv-01578-JEB, Document 26, Page 5 of 9, Memorandum Opinion by Judge Boasberg.

25. Timely determination for the Appeal 2019-00051-A-OS ended July 23, 2019 when it was received June 10, 2019.⁶

⁶ This computation includes the ten days allegedly sitting in the mailroom plus twenty days excluding weekends and legal holidays.

26. Defendant HHS contacted Representative Gregory W. Gregory Steube who relayed to Ms. Mischler on August 8, 2019 that “[a]ccording to the final response I [Rep. Steube] received from the Department of Health and Human Services, your Freedom of Information Act requested is being given appropriate attention and being worked according to their guidelines”. See attachment 6.

OTHER RELEVANT FACTUAL ISSUES

27. 42 U.S.C. 5106a requires a “state plan” and certification that can only be signed by the Governor in order for Kentucky to receive substantial federal funding to use in its child abuse programs.

28. If Defendant Secretary Azar and HHS do not have copies of the required “state plan” and “Governor Certification” as claimed by ACF FOIA; then Kentucky and Secretary Azar have been defrauding the United States because if the state plans do not exist then Kentucky received the 42 U.S.C. 5106a funding without promising to comply with statutory law.⁷ Further Secretary Azar would also be in violation of 42 U.S.C. 5108 which is mandated by the word “*shall*” ensure compliance by Kentucky of the state plan, which ACF FOIA says no documents exist of any Kentucky state plan.

29. On August 8, 2019; Defendant Secretary Azar traveled with Vice President Mike Pence to Kentucky to meet with Kentucky Governor Matt Bevin in Manchester Kentucky.

30. Ms. Mischler reserves the right to amend this petition if evidence shows Defendant HHS and Defendant Secretary Azar have intentionally interfered with Ms. Mischler’s FOIA to

⁷ Kentucky falsified child protective service records against Ms. Mischler to have those records entered into a private child custody dispute between parents. There was no dependency case opened or child abuse court case against Ms. Mischler. The father of Ms. Mischler’s two children is a Kentucky attorney who did not want to pay child support. The FOIA documents requested were to enforce the KY state plan against Defendants Secretary Azar and HHS where Kentucky has intentionally violated its own child abuse statutes.

politically help Kentucky Governor Matt Bevin, who is the most unpopular Governor in the nation. Vice President Pence and Kentucky Governor Bevin have a close personal relationship that preceded the 2016 election.⁸

COUNT I

Violation of FOIA, 5 U.S.C. § 552

FAILURE TO Conduct Adequate Searches for Responsive Records

31. Ms. Mischler repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

32. Ms. Mischler properly requested records within the possession, custody, and control of Defendant HHS.

33. Defendant HHS is an agency subject to and within the meaning of FOIA and must therefore make reasonable efforts to search for requested records.

34. Defendant HHS has failed to promptly and adequately review agency records for the purpose of locating those records which are responsive to Ms. Mischler's FOIA request.

35. Defendant HHS's failure to conduct adequate searches for responsive records violates FOIA.

36. Ms. Mischler is therefore entitled to injunctive and declaratory relief requiring Defendant HHS to promptly make reasonable efforts to conduct adequate searches for records responsive to Ms. Mischler's request.

COUNT II and III

Violation of FOIA, 5 U.S.C. § 552

Wrongful Withholding of Non-Exempt Responsive Records by Defendant HHS OR IN THE ALTERNATIVE

Violation of 42 U.S.C. 5106a, 42 U.S.C. 5108 By Defendant Secretary Azar

⁸ Vice President Mike Pence is believed to be in control of Defendant HHS through his "Indiana Mafia". "Numerous top leaders of the department — including Secretary Alex Azar, Surgeon General Jerome Adams and Medicaid/Medicare chief Seema Verma — have ties to Pence and Indiana." Politico publication May 20, 2019 <https://www.politico.com/story/2019/05/20/mike-pence-health-care-1331705>

37. Ms. Mischler repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

38. Defendant HHS states that no documents exist of the contract between Kentucky and Defendant HHS with regards to child abuse funding. These records are codified in 42 U.S.C. 5106a and 42 U.S.C. 5108 as “state plans” and must exist with the Kentucky Governor signing a certification [contract, quid pro quo, federal funding for agreeing to enforce state child abuse laws] which Defendant Secretary Azar and his predecessors are bound by Federal Statute 42 U.S.C. 5108 to have oversight and monitoring to require Kentucky to be in compliance with 42 U.S.C. 5106a.

39. Either Defendant HHS is wrongfully withholding non-exempt agency records “Kentucky state plan” requested by Ms. Mischler by failing to produce records or in the alternative, the Kentucky state plans does not exist, and Defendant Secretary Azar has failed his Congressionally mandated duties requiring the Kentucky Governor to certify by his signature that Kentucky agrees not to violate child abuse laws in return for federal funding. [42 U.S.C. 5106a]

40. Either Defendant HHS failed to provide all non-exempt responsive records violating FOIA as requested by Ms. Mischler or in the alternative, Defendant Azar is failing his Congressionally mandated duties as codified as “shall” to enforce the Kentucky State plans that Defendant HHS says does not exist. [42 U.S.C. 5108]

41. Ms. Mischler is entitled to declaratory and injunctive relief requiring Defendant HHS to promptly produce all non-exempt records as responsive to her FOIA request *or in the alternative if Defendant HHS continues to maintain that it has no responsive records then Ms. Mischler is entitled to declaratory and injunctive relief against Defendant Secretary Azar* for failing in his mandated duties to enforce the Kentucky State plans that Defendant HHS states are non-existent.

42. In the event, Defendant HHS cannot produce the records in COUNT II then Ms. Mischler is entitled to declaratory and injunctive relief in COUNT III against Defendant Azar for violation of his mandated duties in 42 U.S.C. 5106a and 42 U.S.C. 5108.

COUNT IV

Violation of FOIA 5 U.S.C. § 552(a)(6)(A)(ii) and §552(a)(6)(B)(ii)(I)&(II)

43. Ms. Mischler repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

44. Defendant HHS received Ms. Mischler's appeal on June 10, 2019.

45. 5 U.S.C. §522(a)(6)(A)(ii) states that the 20 day period excluding weekends and legal public holidays "*commences on the date the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency*".

46. Strict application of 5 U.S.C. §522(a)(6)(A)(ii) required Defendant HHS to at least start the commencement of the twenty day period ten days after June 10, 2019. Defendant HHS refused to apply 5 U.S.C. §522(a)(6)(A)(ii) mandates and started the twenty day period on July 18, 2019 which was seventeen days later than the FOIA statute allows. Then Defendant HHS gave itself an additional eleven days to toll the twenty day period without doing so in writing to Ms. Mischler.

47. 5 U.S.C. §552(a)(6)(B)(ii) states the 20 day period shall not be tolled by Defendant HHS unless Defendant HHS made a request to Ms. Mischler for information; tolling the 20-day period while waiting for Ms. Mischler to respond or to clarify with Ms. Mischler issues regarding fee assessment.

48. Defendant HHS neither requested information from Ms. Mischler to toll the 20 day period nor requested clarification from Ms. Mischler regarding fee assessment.

49. Defendant HHS failed to follow the mandates of 5 U.S.C. §522(a)(6)(A)(ii) and §552(a)(6)(B)(ii); Ms. Mischler is entitled to injunctive and declaratory relief requiring Defendant HHS to promptly produce the FOIA documents requested and grant a Factual Finding that Defendant HHS is in willful violation of 5 U.S.C. §552(a)(6)(A)(ii) and §552(a)(6)(B)(ii).

COUNT V

Declaratory finding that Defendant HHS intentionally Misrepresented the truth to Representative W. Gregory Steube concerning FOIA Appeal number 2019-00051-A-OS

50. Ms. Mischler repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

51. Congressional Representative W. Gregory Steube has a vested duty to oversee agencies such as Defendant HHS. Ms. Mischler is harmed by Defendant HHS misrepresenting the truth regarding the handling of FOIA Appeal number 2019-000510A-OS to Rep. Steube.

52. According to Representative W. Gregory Steube, Defendant HHS implied that Defendant HHS was in compliance with the FOIA Statute. See Attachment 7.

53. Defendant HHS has misrepresented the truth to Representative W. Gregory Steube regarding FOIA Appeal number 2019-000510A-OS. It cannot be “*appropriate attention and being worked according to [Defendant HHS] Guidelines*” to violate mandated timelines to start the twenty day process at least ten days after June 10, 2019 when Defendant HHS received appeal 2019-000510A-OS.

54. Defendant HHS has misrepresented the truth to Representative W. Gregory Steube regarding FOIA Appeal number 2019-000510A-OS. It cannot be “*appropriate attention and being worked according to [Defendant HHS] Guidelines*” to unlawfully toll the twenty day period

without communication with Ms. Mischler as required by 5 U.S.C. § 552(a)(6)(A)(ii) and §552(a)(6)(B)(ii)(I)&(II).

55. Defendant HHS has a duty of truthfulness to members of Congress such as Representative W. Gregory Steube.

56. Ms. Mischler is entitled to declaratory relief in the form of a factual finding that Defendant HHS intentionally and willfully misrepresented the truth to W. Gregory Steube concerning the process of FOIA Appeal number 2019-000510A-OS.

28 U.S. Code § 1746 Declaration

57. Pursuant to 28 U.S. Code § 1746 I, Amy Mischler declare under penalty of perjury that the foregoing is true and correct to the best of my ability.

 Executed on August 10, 2019.

REQUESTED RELIEF

WHEREFORE, Ms. Mischler respectfully requests the Court to:

- (1) Order Defendant HHS to conduct a search or searches reasonably calculated to uncover all records responsive to Ms. Mischler's FOIA Request identified in this complaint;
- (2) Order Defendant HHS to produce, within twenty days of the Court order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to Ms. Mischler's FOIA request and a written justification why Defendant HHS is withholding of any responsive records withheld under claims of exemption;
- (3) Order Defendant HHS to produce the Kentucky state plans that are required to exist under 42 U.S.C. 5106a;

- (4) If Defendant HHS cannot produce the “state plans” with the signature of the Kentucky Governor, then the Ms. Mischler requests a Declaratory ruling and Factual Finding that Defendant Secretary Azar is in violation of 42 U.S.C. 5106a, 42 U.S.C. 5108;
- (5) Issue an order for relief/remedy requiring enforcement of 42 U.S.C. 5106a, 42 U.S.C. 5108 against Defendant Secretary Azar;
- (6) Issue a Declaratory Ruling and Factual Finding that Defendant HHS intentionally and willfully violated 2019-000510A-OS timeliness requirements under 5 U.S.C. § 552(a)(6)(A)(ii) and §552(a)(6)(B)(ii)(I)&(II);
- (7) Issue a Declaratory Ruling and Factual Finding that Defendant HHS intentionally and willfully misrepresented the truth concerning its violations of 5 U.S.C. § 552(a)(6)(A)(ii) and §552(a)(6)(B)(ii)(I)&(II) timeliness with regard to 2019-000510A-OS to Congressional Representative W. Gregory Steube;
- (8) Award Ms. Mischler fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. §552(a)(4)(E); and
- (9) Grant Ms. Mischler such other relief as the Court deems just and proper.

Dated: August 10, 2019

Respectfully submitted,



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